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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY d/b/a SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF FOR PETITIONER.

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THE SHERWOOD-KLEIDER PRINTING COMPANY, CHICAGO

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OPINIONS BELOW.

The unreported opinion of the Woodbury District Court (technically, under Iowa procedure, a Ruling on Points of Law) is reprinted at pages 42-50 of the Transcript of Record (hereinafter designated "R"). The opinion of the Supreme Court of Iowa is reported at 119 N. W. 2d 141; it is reprinted at R. 55-60.

JURISDICTION.

The judgment of the Supreme Court of Iowa was rendered on January 15, 1963 (R. 55). The petition for a writ of certiorari was filed on April 6, 1963 and granted on June 17, 1963 (R. 62). The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

The following questions are presented:

(1) Does a court usurp the function of the arbitrator when it decides, in a suit to compel arbitration under Section 301(a) of the Labor-Management Relations Act of 1947, that a walkout assertedly in violation of a no-strike clause in a collective bargaining agreement amounts to a waiver by the union of its right to arbitrate under the agreement?

(2) In a suit under Section 301(a) to compel arbitration, may a court properly decide, on the pleadings alone, that under federal law a walkout violated a no-strike clause even though the union expressly denied any violation?

(3) In suit under Section 301(a) to compel arbitration of employee discharge grievances, does the court exceed its power and determine the merits—*i.e.*, that participation in a walkout was just cause for the discharges—when it decides that the claimed walkout violated the no-strike clause?

(4) Does the filing of unfair labor practice charges with the National Labor Relations Board constitute a waiver by the union of its contract right to arbitrate the separate issue of whether discharges were for just cause within the terms of the collective agreement?

STATUTE INVOLVED.

The statutory provision involved is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185(a), which reads as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

The Pleadings.

Petitioner, a labor organization representing employees of Respondent, filed a petition in equity in the District Court of Woodbury County, Iowa to compel Respondent to arbitrate two grievances which had arisen under a collective bargaining agreement between the parties.* The petition, which was filed on August 26, 1961, invoked the state court's concurrent jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947 (R. 1-6).

The petition charged Respondent with violating the collective bargaining agreement (R. 7-21) by refusing to submit the grievances to arbitration. The grievances themselves, copies of which were attached to the petition, complained that Respondent had improperly discharged certain employees and demanded their reinstatement with pay for time lost and restoration of full seniority rights. One grievance, designated 1-A, protested the improper discharge of one employee (R. 3, 22), while grievance 2-A complained of the discharge of approximately 190 other employees (R. 3, 23). The petition alleged that all 191 employees were discharged in violation of certain provisions of the agreement, including a provision which limits Respondent's right to discharge to instances where "just cause" for such penalty exists (R. 3-4).

Respondent filed an answer and counterclaim and pleaded

* Section 33(c)(5) of the agreement provides as follows (R. 19): "In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union . . . Said Arbitration Board shall have authority only to interpret and apply the provisions of this contract." There is no express language in the agreement excluding any class of disputes from the coverage of this arbitration provision.

certain legal and affirmative defenses (R. 30-34). Among its affirmative defenses, Respondent alleged, with respect to grievance 1-A, that Petitioner had refused to proceed beyond steps 1 and 2 of the five-step grievance procedure and had, instead, "caused a work stoppage and strike" which constituted "a waiver of any right to proceed further" with grievance 1-A (R. 32). With respect to grievance 2-A, involving the 190 employees, Respondent asserted that the 190 grievants "voluntarily struck" in violation of the contract's no-strike clause and "by their own election ceased to be employees of the defendant or to be entitled to the benefits of grievance and arbitration procedure, or any other provisions of the contract" (R. 32).

In its reply, Petitioner expressly denied that it had caused or authorized any strike or walkout (R. 34), denied that it had refused to proceed further with grievance 1-A (R. 35), and maintained that allegations with respect to a strike in violation of the no-strike clause and the union's waiver of its right to arbitrate related to the merits of the grievances and might be considered only by the arbitrator (R. 34, 35, 36). Petitioner admitted that on the day in question, May 11, 1961, "certain employees" (not the entire 191 who were discharged) left their jobs, but alleged that such action was without Petitioner's authorization and that those employees "were compelled to leave their work by reason of the [Respondent's] repeated and then existing prior breach of the collective bargaining agreement" (R. 34).

Petitioner at no time admitted that a "strike" had occurred and expressly denied a breach of the no-strike clause either on its own part or on the part of any employees (R. 34, 35, 36).

On January 10, 1962, Respondent filed an application, pursuant to Rule 105 of the Iowa Rules of Civil Procedure,

asking the court to hear and determine points of law raised in the pleadings (R. 41-42). The application asked the court to rule that Petitioner was not entitled to compel Respondent to arbitrate for the reasons that: (1) under Iowa law and procedure the court could not specifically enforce an executory agreement to arbitrate; (2) Petitioner had "waived" its right to enforce the grievance and arbitration provisions of the agreement (a) by "bringing an action before the NLRB to enforce its claimed rights", and (b) by "engaging in a 'walkout' in violation of the contract"; and (3) the notice of grievance was not timely.

Ruling of the Trial Court.

In a ruling on February 13, 1962, the trial court sustained all of Respondent's contentions except the third, which the court stated could not be determined upon the pleadings alone (R. 42-50).* The court rejected the contentions of Petitioner (1) that federal law, and not state law, applied; (2) that Respondent's allegations with respect to the alleged walkout related to the merits of the grievances and that under federal law the effect, if any, of any walkout was a matter to be determined by the arbitrator and not by the court; and (3) that filing unfair labor practice charges with the NLRB did not waive the contractual right to arbitrate.

Specifically, the trial court held *that Iowa law and not federal law applied;* that under Iowa law an executory agreement to arbitrate was not enforceable in equity; that filing unfair labor practice charges constituted a waiver of

* With respect to the timeliness of the grievances, Petitioner had argued that the determination of Petitioner's compliance with the procedural steps of the grievance procedure was a matter for the arbitrator, not the court, to consider. The trial court's ruling suggests the possibility of an inquiry into matters of fact on the issue of timeliness should the case be remanded to that court for further consideration.

the contractual right to arbitrate; and that the strike, assertedly in violation of the "no-strike" clause (notwithstanding Petitioner's specific denials both as to the occurrence of a strike and as to violation of the no-strike clause), also amounted to a "waiver" of the right to arbitrate (R. 42-50). The court's rulings were made solely on the basis of the pleadings and argument, without the benefit of testimony or other evidence.

The rulings of the trial court amounted to a complete adjudication of Petitioner's rights and had the effect of dismissing the petition on matters of law. All that remained for adjudication in the trial court was Respondent's counterclaim for breach of contract for damages claimed to have been occasioned by the strike.

Decision of the Supreme Court of Iowa.

Petitioner promptly applied to the Supreme Court of Iowa for an order permitting an interlocutory appeal (R. 51-54), which application was granted (R. 54). On January 15, 1963, the Supreme Court of Iowa affirmed the lower court (R. 55-60).

The Supreme Court of Iowa held that Petitioner "waived its right to arbitrate" by the alleged walkout in violation of the no-strike clause (R. 59). Notwithstanding the state of the pleadings, the Iowa Court stated (R. 58): "In the instant case we are squarely faced with [the] issue of a waiver of [the] right to arbitrate because of [a] breach of [the] no-strike clause." The court also wrote (R. 59):

> We think the "quid pro quo" view advanced in the Lincoln case [*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957)] is the sound and sensible rule to adopt. . . . We think the trial court was correct in holding the *Union* had waived its right to arbitrate the grievances filed by *its* walkout. [Emphasis supplied.]

One Justice dissented, stating: "What I believe to be the error in the majority opinion is holding that once an evidence of a violation of a no-strike clause appears the parties are no longer required to arbitrate" (R. 60).

The majority opinion also contained the following observation (R. 59): "Two other matters are urged but we find no merit therein and make no comment thereon." In addition to the matters which the Iowa Court expressly decided,* Petitioner had urged as error only one further ruling of the trial court, namely, its determination that filing an unfair labor practice charge with the National Labor Relations Board waives contractual rights to arbitrate. Since the Iowa Court's cryptic reference to "two other matters" must have included Petitioner's appeal from the lower court's finding on the question of "waiver" by filing charges and must have been intended as an affirmance of the lower court's ruling on this issue, Petitioner has felt compelled to argue the question in this Court.

---

* Respondent conceded before the Iowa Supreme Court that the trial court erred in ruling that state law applied; that Court acknowledged that federal law governed (R. 57), as Petitioner had urged from the outset of the case.

SUMMARY OF ARGUMENT.

I.

In determining whether or not a dispute should be submitted to arbitration, in a suit to compel a party to arbitrate, the role of a court is limited. Its function is to decide whether the grievance sought to be arbitrated makes a claim, which, *on its face,* is governed by the contract; if so, the duty of the court is to order the dispute submitted to the arbitrator, in accordance with the parties' agreement, for a determination on the merits. Any inquiry by the court into the merits, even in the process of interpreting the arbitration clause, is error, for only the arbitrator is entitled to determine the merits. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The Iowa courts necessarily decided the merits when they held that the alleged walkout constituted a waiver of the union's right to arbitrate. The grievances advanced by Petitioner claim that the discharges were in violation of the collective bargaining agreement. In view of Respondent's assertion that the walkout was in violation of contract, a dispute is presented as to whether participation in the alleged walkout constituted just cause for the discharges. This is a dispute the arbitrator must resolve and, in so doing, he must decide other related questions, such as whether there was justification for the employees' actions.

These questions necessarily involve the merits. The Iowa courts, by holding that the union waived its right to arbi-

trate by reason of the claimed strike, thus passed upon the very questions the arbitrator should decide. The Iowa courts failed to recognize that the question of whether or not there had been a violation of the no-strike clause was a question of contract interpretation and that, under the collective bargaining agreement, the parties had agreed that only the arbitrator should determine such questions.

The federal Courts of Appeals and District Courts, unlike the Iowa courts, have uniformly held that a claimed breach of a no-strike clause does not prevent the union from obtaining arbitration. Some of the courts have expressly recognized that discharges for participation in a strike claimed to be in violation of the agreement are arbitrable. In so deciding, these courts have rejected the argument, advanced by Respondent and accepted by the Iowa courts, that the union by its actions has waived or repudiated its right to arbitrate. *International Moulders and Foundry Workers* v. *Susquehanna Casting Company*, 283 F. 2d 80 (C.A. 3d 1960); *Local 748, International Union of Electrical, Radio and Machine Workers* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (1963).

Even if the Petitioner here admitted that it had violated the no-strike clause—and Petitioner has denied any violation—the disputes presented by the grievances should have been submitted to arbitration.

II.

In large part the Iowa Court's difficulty arises from its misinterpretation of this Court's language in the *Lincoln Mills* case, 353 U. S. 448, 455 (1957), where this Court stated that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." The Iowa Court concluded that this language means that arbitration clauses and no-strike provisions are mutually dependent.

Thus, on the Iowa Court's view, any walkout contrary to a no-strike clause would preclude arbitration of the propriety of any discharges occasioned by the walkout. This Court, however, has plainly stated that there is no such rigid rule. *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 261 fn. 7 (1962). The agreement to arbitrate all disputes, without excluding those involving action by the union contrary to a no-strike clause, indicates that the parties did not make arbitration dependent upon the absence of strikes. An alleged strike is not automatically a repudiation of the arbitration provisions of the agreement.

Furthermore, the Iowa Court overlooks the fact that the employer retains his remedy for violation of the no-strike clause: he is still free to sue for damages, as Respondent has done here by way of counterclaim.

III.

Even if there were scope for judicial inquiry into the claim that the union had violated the no-strike clause, a determination of that issue would require a consideration of the facts. Here, however, the Iowa courts simply assumed the facts to be what they said they were, despite express denials by Petitioner of any breach of the no-strike clause. The pleadings disclosed a dispute as to whether or not a strike had taken place and, if it had, whether there was justification for it. Justice Thornton, in dissenting, recognized that it was improper for the majority of the Court simply to assume that there had been a violation of the no-strike clause.

This assumption by the Iowa Court tends to emphasize the danger of judicial intrusion into areas reserved for arbitrators. The Iowa Court did not consider, and could not have considered, any of the important circumstances

bearing upon the claim that the union had repudiated the contract and had thus forfeited its right to arbitrate. These circumstances are virtually identical to the merits of the grievances themselves. They are matters which are best left to the processes of arbitration under the parties' agreement to arbitrate.

IV.

The filing of charges with the NLRB did not constitute a waiver of the union's right to arbitrate, and, insofar as the Iowa Supreme Court may be considered so to have held, its conclusions are erroneous. Resort to the NLRB and the use of arbitration machinery under a collective bargaining agreement involve quite separate rights; these rights are not mutually exclusive, and there is no applicable doctrine of election of remedies.

The National Labor Relations Board is concerned with acts which constitute unfair labor practices. In the case of an employee discharge, it can only determine whether or not the discharge was contrary to the Act. It cannot decide the separate question of whether there was "just cause" for the discharge under the collective bargaining agreement. Only an arbitrator empowered by the parties to make such a decision can do so.

There is nothing to prevent the same act from constituting an unfair labor practice and, at the same time, a violation of the contract between the parties. A party claiming to be aggrieved may seek two remedies: one for the unfair labor practice, a remedy which is available through the NLRB; and the other for violation of contract, a remedy which, if the contract provides for arbitration, the party seeks from the arbitrator. *Machinists Lodge No. 12 v. Cameron Iron Works, Inc.*, 257 F. 2d 467 (C.A. 5th 1958), cert. den. 358 U. S. 880.

ARGUMENT.

I.

IN HOLDING THAT PETITIONER "WAIVED" ITS RIGHT TO ARBITRATE BY VIOLATING THE NO-STRIKE CLAUSE, THE IOWA COURTS USURPED THE FUNCTIONS OF THE ARBITRATOR.

A.

A Court May Not Consider the Merits of an Arbitrable Grievance.

Since 1957 this Court has consistently recognized that federal labor policy favors arbitration as the optimum means of settling disputes under collective bargaining agreements. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448. Contract arbitration provisions have therefore been regarded as essential devices for preserving industrial peace. *Lincoln Mills* held not only that such arbitration clauses were enforceable under Section 301(a), but that they were to be enforced under a uniform body of substantive federal law which the courts were to "fashion from the policy of our national labor laws" 353 U. S. 448, 456. Thus, contrary to the widespread state-law rule (applied by the trial court in this case) that executory agreements to arbitrate will not be enforced in equity, arbitration clauses in collective agreements are enforceable under federal law derived from Section 301(a).

Moreover, since the arbitration clause in a labor agreement is designed to accomplish a unique purpose, the role of a court, called upon to enforce such a provision, is likewise unique. In the *Steelworkers* trilogy of 1960, *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, this Court delineated the boundaries of judicial in-

quiry in a suit under Section 301(a) to compel a reluctant party to arbitrate. In such a cause, a court may not consider the merits of the grievance which the plaintiff seeks to arbitrate, even in determining the threshold question of arbitrability.

As expressed in the *American Manufacturing Co.* decision, 363 U. S. 564, 568-69:

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values [of] which those who are not a part of the plant environment may be quite unaware.
>
> . . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

The Court was equally explicit in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Further, in *Warrior & Gulf*, at 363 U. S. 574, 585, the Court warned against attempts to persuade judges "to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator".

Thus the place of arbitration in the scheme of the federal labor laws requires that a court decline to consider the merits of a grievance in a suit under Section 301(a) to compel arbitration. It is this important principle which should determine the result in the present case.

B.

Allegations Concerning an Alleged Breach of the No-Strike Clause Relate to the Merits of the Grievances.

In holding that the alleged walkout constituted a waiver of the right to arbitrate, the Iowa courts went to the very heart of the merits of Petitioner's grievances. Those grievances assert that Respondent discharged certain employees in violation of the collective bargaining agreement (R. 22-24). Respondent claims that the employees terminated their employment by participating in an alleged walkout and that such strike action "waived" the union's right to arbitrate (R. 30, 32, 41).

Thus there is a fundamental dispute as to the effect of the asserted strike. The issue fairly posed by the grievances and Respondent's defense is whether participation in the alleged strike constituted just cause for discharge. There are also other, closely-related questions for the arbitrator to consider, such as: What employees, if any, actually engaged in a walkout? Was resort to such action permitted under the no-strike clause because of prior acts of the company contrary to its contract obligations? Was discharge the proper penalty even if just cause for *some discipline* existed?

These questions comprise the merits. It was virtually impossible for the courts below to decide that the asserted strike waived the right to arbitrate without intruding upon them. The acts said to constitute the waiver and the acts

justifying the discharges are, realistically, inseparable. When the Iowa courts presumed to decide the question of whether the union had lost its right to arbitrate, they determined the issues which the arbitrator would be called upon to decide.

Viewing this error from another vantage point, the Iowa courts failed to recognize that, under applicable federal law, the issue they decided—whether or not the employees violated the no-strike clause—is a question of contract interpretation, a question which the parties had agreed an arbitrator should determine. The arbitration clause, Section 33(c)(5) of the agreement, provides, without limitation of any kind, that disputes "with reference to the proper interpretation or application of the provisions of this contract" are to be submitted to arbitration (if not settled in preceding steps of the grievance procedure) (R. 19). When the Respondent alleges, and Petitioner denies, that the no-strike clause was violated, an issue is presented as to the "interpretation or application" of the agreement. The contract prescribes that that issue be submitted to arbitration.

C.

The Courts of Appeals and District Courts Have Rejected the Contention That a Claimed Violation of a No-Strike Clause Bars Arbitration.

Particularly since the *Steelworkers* cases, the federal courts have uniformly held that the claim of a walkout in violation of a no-strike clause is not a defense to a suit to compel arbitration. One of the leading decisions is *International Moulders and Foundry Workers* v. *Susquehanna Casting Company*, 283 F. 2d 80 (C. A. 3d 1960). Under circumstances similar to those involved here, the

court recognized that it was bound to submit the controversy to arbitration, writing, at 283 F. 2d 80, 81:

> The Union's grievance consists of the discharge of some thirty employees by the Company. Under Article IV of the contract the right to discharge for "proper cause" is vested in the Company. The Union's claim, which it wishes arbitrated, is that the discharge was not for proper cause. The company says, however, that the no-strike provision which appears in Article V of the contract was violated and, therefore, the discharge was proper, that the Union broke the contract and no arbitration can be properly called for.
>
> • • • • •
>
> *The fact that the Company alleges that there was a violation of the contract by the Union quite clearly does not relieve it from the responsibility of arbitrating the propriety of the discharges here in question.* As pointed out by the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* . . . , we must not confuse the scope of the labor-management contract with rules applicable to commercial contracts however well settled in that area.
>
> There certainly was a grievance in this instance, namely, the discharge of thirty men claimed by the Union not to be a proper one. It is admitted by the Union that on one day some men did leave their work for at least a portion of a day. Whether that leaving was justified by the circumstances is a question for the arbitrator. If it was not justified, there is a further question of whether the drastic remedy of discharge of these men was a proper one under the terms of the contract. In other words, this case is one precisely suited to the arbitration process under the agreement that the parties have made. [Emphasis supplied.]

More recently, in *United Textile Workers of America, Local 120* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C. A. 4th 1963), the employer, in a motion to dismiss, contended that it had been relieved of any obligation to arbitrate

employee discharges by reason of a breach of a no-strike clause—the very action which resulted in the discharges. Relying upon this Court's decisions in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), the court rejected the employer's arguments as to waiver and estoppel and affirmed the district court's grant of summary judgment directing arbitration. In explaining its decision, the Court of Appeals wrote, at 315 F. 2d 217, 219:

> In resolving doubts "in favor of coverage," the courts have been instructed that the parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used. It cannot be said with "positive assurance" that this arbitration agreement does not comprehend the discharges that are being contested. That is, since discharges for engaging in strikes have not been explicity excluded from the coverage of the arbitration agreement, we are not persuaded that the discharges in issue are not "[g]rievances arising out of the operation and interpretation of this [collective bargaining] agreement involving wages • • • hours, or other conditions of employment • • •." Surely, adopting a liberal interpretation of the language, as directed by the Supreme Court, the discharges are grievances as defined by the agreement.

In dealing with the claim that the union had waived its right to arbitrate, even if the grievances were arbitrable, the *Newberry Mills* court concluded that *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), disposed of that argument.

The Court of Appeals for the Sixth Circuit has also rejected the defense of waiver or repudiation of the right to arbitrate the discharge of strikers under circumstances much like those here. *Local 748, International Union of*

Electrical, Radio and Machine Workers v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (1963). In the *Jefferson City* case, the union apparently did not question the employer's claim that the striking employees had violated the no-strike clause in the agreement. The court observed that *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), "sustain the Union's demand of arbitration."

Several district courts have also considered, and rejected, employers' claims that a strike in violation of a no-strike clause bars the arbitration of discharges resulting from the strike. The facts in *Retail, Wholesale and Department Store Union, Local 1085* v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M. D. Pa. 1961), are virtually identical to the facts alleged by Respondent. There the employer discharged a group of employees on November 2, 1960; the other employees walked out the following day. The employer then discharged the latter employees. The union filed an action to compel arbitration of the discharges; the employer filed a motion for judgment on the pleadings, alleging that the union's "members refused to and did not report for work and commenced a strike" and that the union was estopped from seeking arbitration. The court denied the employer's motion for judgment, relying upon *Susquehanna Casting Company*, 283 F. 2d 80 (C. A. 3d 1960), and the *United Steelworkers* cases, *supra*.

In *Armstrong-Norwalk Rubber Corp.* v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. Conn. 1958), appeal dismissed 269 F. 2d 618 (C. A. 2d 1959), the issue arose in a converse context. In that case, when the employer discharged the union's president, the union called

a strike to enforce its demand that its president be reinstated. The strike, according to the court's opinion, lasted five weeks and "substantially stopped production at the employer's plant". The employer filed a suit to stay the arbitration which the union demanded. As the court characterized the employer's position, at 167 F. Supp. 817, 818:

> It is the legal consequences of this strike which is the major issue in the present action. The employer has sued to stay arbitration of the Clayborne discharge on the theory that the strike was a repudiation of the no-strike provision of the collective bargaining agreement which forfeited the right of the union to invoke arbitration and freed the employer of any obligation to arbitrate the matter of Clayborne's discharge.

In granting the union's motion to stay the employer's action pending arbitration, the court concluded, at 167 F. Supp. 817, 821:

> Not only was the Clayborne discharge arbitrable here, *but the effect of a claimed breach of the no-strike clause of the contract was arbitrable as well.* [Emphasis supplied.]

In the present case the Iowa courts decided the merits under the guise of determining whether certain alleged conduct of Petitioner's members relieved the employer of its obligation to arbitrate. Even if a breach of the no-strike clause had been admitted, the Iowa courts should have submitted the dispute to arbitration.

II.

THE SUPREME COUT OF IOWA MISCONSTRUED THIS COURT'S "QUID PRO QUO" LANGUAGE IN LINCOLN MILLS.

The decision of the Iowa Supreme Court is largely attibutable to its misinterpretation of what it terms the "*quid pro quo* rule." The Iowa Court stated its view as follows (R. 58-59):

> Whether the "quid pro quo" rule will be followed to the extent of declaring a breach of a no-strike clause constitutes a waiver of rights to arbitrate under the agreement, depends upon the view to be taken of Section 301(a), supra. Clearly, under said rule work stoppage by strikes, etc., is not conducive to economic tranquility and progress. If the view is taken that a strike is merely another incident or grievance which should be decided as are other contract violations, it would seem the Company has relinquished many valuable rights and received nothing in return and arbitration agreements will be shied away from. In fact the purpose of Section 301(a) will be entirely emasculated. If, on the other hand, the view is taken that a no-strike clause means what it says and that if the Union has the right to require arbitration of differences arising between it and the Company then the Company has a similar right to have the Union abide by its agreement we are well along the road to labor and management tranquility. It "should not have its cake and eat it too". *We think the "quid pro quo" view advanced in the Lincoln case* [*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 455 (1957)], *supra, is the sound and sensible rule to adopt.* [Emphasis supplied.]

The reference to *Lincoln Mills* is obvious: "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." 353 U. S. 448, 455 (1957).

The Iowa Court's view that arbitration and no-strike provisions are mutually dependent has not been accepted by this Court. Such a view would mean that each and every walkout in the face of a no-strike clause would preclude arbitration of discharges resulting from the walkout, irrespective of the circumstances. Instead, this Court has emphasized that there is "no . . . inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation." *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 261 (1962). In this case, as in *Drake Bakeries*, 370 U. S. 254, 262, it may be said that "by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise."

Moreover, the Iowa Court's somewhat mechanical view is inconsistent with this Court's decision in *Mastro Plastics Corp.*, v. *NRLB*, 350 U. S. 270 (1956), which recognizes that not all strikes violate no-strike clauses. To the Iowa Court, the circumstances of the alleged breach are of no significance; to this Court, however, "the circumstances of the claimed repudiation are critically important." *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 262-3.

The Iowa Court's quaint homily that the union "should not have its cake and eat it too" (R. 59) evidences a mistaken belief that, if the union did violate the no-strike clause, it would emerge without penalty were the company ordered to arbitrate. What this view overlooks, however,

is that the company has its remedy in damages for any violation of the no-strike clause. Here Respondent has filed its counterclaim for damages, and even if compelled to arbitrate Respondent may press its claim for damages for breach of contract. Each party clearly has a contract remedy for violations by the other.

III.

EVEN IF THERE WERE ANY SCOPE FOR JUDICIAL DETERMINATION OF THE CLAIM THAT THE UNION VIOLATED THE NO-STRIKE CLAUSE, THE PLEADINGS DISCLOSED AN ISSUE WHICH COULD NOT BE RESOLVED IN THE ABSENCE OF EVIDENCE.

The Iowa Supreme Court's conclusion that Petitioner violated the no-strike clause in the collective bargaining agreement not only usurps the function of the arbitrator, it does so by assuming unproved facts.

In its affirmative defenses, Respondent alleged that Petitioner "and its members struck against defendant" and set up a picket line, and that said "strike was contrary to" the provisions of the no-strike clause (R. 31); that Petitioner "caused a work stoppage and strike", thereby waiving any right to proceed further with Grievance 1-A, which had been processed through Steps 1 and 2 of the grievance procedure (R. 32); and that the aggrieved employees under Grievance 2-A "voluntarily struck" in violation of the no-strike clause and thus ceased to be employees or entitled to any benefits of the agreement (R. 32).

In its reply, Petitioner denied that it authorized any walkout, admitting merely that certain employees (not the entire group discharged) left their jobs on the day in question (R. 34). Further, Petitioner alleged that those employees who did leave their jobs were compelled to do so "by reason of the repeated and then existing prior breaches

of the collective bargaining agreement" by Respondent (R. 34).

Petitioner denied every allegation that the no-strike clause had been violated (R. 35, 36). Moreover, it asserted repeatedly that questions as to claimed breaches of the agreement had to do with the merits of the grievances and therefore could be determined only by the arbitrator (R. 34, 35, 36).

In the light of these conflicting allegations, it is difficult to see how the Iowa Court could have decided that "the Union had waived its right to arbitrate the grievances" (R. 59), except by completely ignoring Petitioner's pleadings. Even if it were proper for the court (instead of the arbitrator) to decide questions as to an asserted breach of the no-strike clause, such a judicial decision could not properly have been made on the record here. A real conflict was disclosed by the pleadings; the Iowa Court quite obviously reached its decision by assuming that the facts were what it said they were.

Justice Thornton, dissenting, recognized that the view of the majority was not supported by the record; he wrote (R. 59):

> I respectfully dissent. The pleadings in this case should not be construed to hold that a violation of the no-strike clause is admitted or stands undenied. The question is not ready for decision under rule 105, Rules of Civil Procedure.

The Iowa Court's determination of a factual controversy in a ruling on the pleadings underscores the dangers inherent in a court's undertaking to inquire into matters best left to an arbitrator's judgment. The dissenting Justice commented that the majority opinion goes far beyond the permitted scope of inquiry in a suit under Section 301(a) to compel arbitration (R. 60):

> Further, the parties have agreed on a tribunal for

the determination of questions arising, "with reference to the proper interpretation or application of the provisions of this contract." This provision is not a narrow one. It includes the no-strike clause. The fact that arbitration may be instigated only at the request of the union should not be determinative. The company has so agreed. Whether or not there has been a violation of the no-strike clause is proper for the arbitrators to consider in determining the grievance. A waiver would go to the merits of that question.

Having before it only the pleadings in the case, the Iowa Court could not have considered the circumstances of the claimed walkout, the justification for such action, the number of employees involved, the duration of their walkout, Petitioner's responsibility, or any of the other factors bearing directly on the alleged waiver of the right to arbitrate. The Iowa Court thus considered none of the "circumstances of the claimed repudiation" viewed by this Court to be "critically important". *Drake Bakeries, Inc. Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 262-63 (1962); nor could it weigh the "character" of the repudiation deemed controlling by Professor Corbin. 6 Corbin, *Contracts*, § 1443 (1961 Supp.) n. 34, pp. 192-193.

Although the circumstances of any claimed "repudiation" are vitally important, it does not follow that a court should consider them. Where the discharges in dispute result from an alleged work stoppage and the union claims that there was justification for such walkout as did occur, the "critically important" circumstances are all but inseparable from the merits of the grievances themselves. The facts justifying the walkout "may assume proportions of which judges are ignorant." *United Steelworkers of America* v. *American Manufacturing Company*, 363 U. S. 564, 567 (1960). A determination may require reference to the "industrial common law—the practices of the industry

and the shop." *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574, 582 (1960). In short, resolution of the disputed issues concerning the asserted breach of the no-strike clause is a function "precisely suited to the arbitration process under the agreement that the parties have made". *International Moulders and Foundry Workers* v. *Susquehanna Casting Company*, 283 F. 2d 80, 81 (1960).

IV.

FILING UNFAIR LABOR PRACTICE CHARGES IS NOT A WAIVER OF THE RIGHT TO ARBITRATE.

Insofar as the Iowa Supreme Court may be presumed to have affirmed the trial court's holding that filing unfair labor practice charges with the National Labor Relations Board constituted a waiver of the union's right to arbitrate, its conclusions are clearly erroneous. Resort to the NLRB and the use of the grievance and arbitration provisions of a collective bargaining agreement involve the exercise of wholly separate and distinct rights. The exercise of one right in no way precludes the other.

The arbitration of grievances constitutes a means for the voluntary settlement of disputes between parties to collective bargaining agreements. An aggrieved party seeks a private remedy before the arbitrator for violation of the agreement.

The function and purpose of action by the National Labor Relations Board are totally different. The NLRB, as a federal agency created by statute, is empowered only to administer and enforce the provisions of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947. Specifically, in the case of an employee discharge, the Board can determine only whether the discharge violated the Act. The Board cannot and does

not determine the different question of whether there was "just cause" for the discharge within the meaning of a collective bargaining agreement. The latter question may be determined only by an arbitrator empowered by the contract between the parties to make such a determination. The Board has no jurisdiction to enforce collective bargaining agreements, and the violation of a collective bargaining agreement is not an unfair labor practice under the Act. *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 443 fn. 2 (1955).

The petition in the present case seeks to compel Respondent to arbitrate the question of just cause for the discharge of employees. No unfair labor practice is charged, for neither the arbitrator nor the court has jurisdiction to determine unfair labor practices. The only relief sought is for contract violations.

The same act may be both an unfair labor practice and a contract violation; a party may simultaneously seek remedies for both. *International Union of Operating Engineers* v. *Gulf Oil Co.*, 262 F. 2d 80 (C. A. 5th 1958); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C. A. 3rd, 1956). In *Machinists Lodge No. 12* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467, 472-73 (C. A. 5th 1958), cert. den. 358 U. S. 880, the court stated:

> However, the appellee overlooks the obvious distinction between *contract* provisions and *matters committed exclusively to the Board.* If an arbitrable contract provision encompasses unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the preemptive area. Likewise, the better reasoned cases hold that even where the aggrieved incident or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the Federal District Courts will not be deprived of the jurisdiction to grant

relief as to the breach of contract, the other aspect being left to the Board. However, in this case, we must go one-step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a "breach of contract *is not* an unfair labor practice"; the former is enforced by the courts, the latter by the Board . . . (Emphasis in original).

Other courts have recognized the distinct and separate character of grievance arbitration and unfair labor practice proceedings, and they have held that pursuing rights in one forum does not bar a party from pursuing other rights in the other forum, even where a union, seeking to compel an employer to arbitrate, has already filed unfair labor practice charges complaining of the same conduct involved in the grievance. *Glass Bottle Blowers Ass'n* v. *Arkansas Glass Container Corp.*, 183 F. Supp. 829, 830 (E. D. Ark. 1960); *Retail Shoe Salesmen's Union, Local 410*, v. *Sears Roebuck & Co.*, 185 F. Supp. 558 (N. D. Calif. 1960).

The view of the trial court, presumably approved by the Iowa Supreme Court, would have a crippling effect on industrial relations. The National Labor Relations Act specifically provides, in Section 10(a), 29 U.S.C. § 160(a), that:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . .

Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d), provides further:

> Final adjustment by a method agreed upon by the

parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

These statutory admonitions that the Board's role is not affected by other remedial action and that private settlement of contract disputes is desirable are conclusive evidence of Congress' recognition that both the employer and the union should be able, at the same time, to seek arbitration *and* to invoke the Board's jurisdiction.

CONCLUSION.

For the foregoing reasons, Petitioner prays that this Court determine that the grievances set forth in the pleadings should be submitted to arbitration and reverse the decision of the Supreme Court of Iowa, remanding to that Court with instructions to return the cause to the District Court of Woodbury County, Iowa, for further proceedings in conformity with this Court's judgment and opinion.

Respectfully submitted,

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